

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel, W.A. DREW  
EDMONDSON, in his capacity as ATTORNEY  
GENERAL OF THE STATE OF OKLAHOMA,  
et al.,

Plaintiffs,

v.

Case No. 4:05-CV-329-TCK-SAJ

TYSON FOODS, INC., et al.,

Defendants.

**DEFENDANTS' RESPONSE IN OPPOSITION TO BILL STEWART'S,  
INDIVIDUALLY AND D/B/A DUTCHMAN'S CABINS, ADOPTION AND  
JOINDER OF THE ARGUMENTS AND AUTHORITY SET FORTH IN THE STATE OF  
OKLAHOMA'S MOTION TO SEVER AND STAY AND/OR STRIKE OR DISMISS THE  
CLAIMS ASSERTED IN THE THIRD-PARTY COMPLAINTS AND IN THE BRIEF OF  
THE BERRY GROUP OF THIRD-PARTY DEFENDANTS FOR DISMISSAL, AND  
ALTERNATIVELY FOR SEVERANCE AND STAY OF THE THIRD-PARTY  
COMPLAINT OF DEFENDANTS/THIRD-PARTY PLAINTIFFS TYSON FOODS, INC.,  
TYSON CHICKEN, INC., COBB-VANTRESS, INC., PETERSON FARMS, INC.,  
SIMMONS FOODS, INC., GEORGE'S INC., AND WILLOW BROOK FOODS, INC.**

COME NOW Defendants, Tyson Foods, Inc.; Tyson Poultry, Inc.; Tyson Chicken, Inc.; Cobb-Vantress, Inc.; Cal-Maine Foods, Inc.; Cal-Maine Farms, Inc.; George's, Inc.; George's Farms, Inc.; Peterson Farms, Inc.; Simmons Foods, Inc.; and Willow Brook Foods, Inc. (collectively, "Defendants"), and, by and through their respective attorneys, hereby submit the following response in opposition to *Bill Stewart's, Individually and D/B/A Dutchman's Cabins, Adoption and Joinder of the Arguments and Authority Set Forth in the State of Oklahoma's Motion to Sever and Stay and/or Strike or Dismiss the Claims Asserted in the Third-Party Complaints and in the Brief of the Berry Group of Third-Party Defendants for Dismissal, and Alternately for Severance and Stay of the Third-Party Complaint of Defendants/Third-Party Plaintiffs Tyson Foods, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc.,*

*Simmons Foods, Inc., George's, Inc., and Willow Brook Foods, Inc.* (Docket No. 801) (“Motion to Dismiss”)

## I. ARGUMENT

1. Third Party Defendant Bill Stewart (“Mr. Stewart”), individually and d/b/a Dutchman’s Cabins, has filed a motion to dismiss and/or to sever and stay Defendants’ Third Party Complaint (Docket No. 80) by adopting and joining the Plaintiffs’ Motion to Sever and Stay and/or Strike or Dismiss the Claims Asserted in the Third-Party Complaints (“*Plaintiffs’ Motion*”) (Docket No. 247) and the Motion and Brief of the Berry Group of Third-Party Defendants for Dismissal, and Alternatively for Severance and Stay of the Third-Party Complaint of Defendants/Third-Party Plaintiffs, Tyson Foods, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., Simmons Foods, Inc., George’s, Inc., and Willow Brook Foods, Inc. (Docket Nos. 588 and 589, respectively) (the “*Berry Group Motion and Brief*”).

2. Through his joinder and adoption of the *Berry Group Motion and Brief*, Mr. Stewart has moved this Court to dismiss the Third Party Complaint (“TPC”) pursuant to Fed. R. Civ. P. 12(b)(6) for an alleged failure to state a claim upon which relief can be granted. *See Berry Group Motion* (Docket No. 588) at 1, 4.

3. Mr. Stewart filed his Motion to Dismiss after he answered the TPC. *See* May 11, 2006 Answer of Bill Stewart, D/B/A Dutchman’s Cabins to Third Party Complaint. (Docket No. 576)

4. A party must file his motion to dismiss for failure to state a claim upon which relief can be granted *before* he answers a complaint. *See* Fed. R. Civ. P. 12(b) (“A motion making any of these defenses shall be made before pleading if a further pleading is permitted.”); *accord Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 n. 2 (10<sup>th</sup> Cir. 2002).

5. Because Mr. Stewart filed his Motion to Dismiss after filing his answer, the Motion to Dismiss should be treated as a Rule 12(c) motion for judgment on the pleadings which has the same standard of review as a Rule 12(b)(6) motion. *See id.*; *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 954 (9<sup>th</sup> Cir. 2004) (“a [FRCP] 12(b)(6) motion must be made *before* a responsive pleading. [T]he Defendants filed their motion to dismiss *after* filing their answer. Thus, the motion should have been treated as a motion for judgment on the pleadings, pursuant to Rule 12(c) or 12(h)(2).”) (emphasis in original); and *De Muria v. Hawkes*, 328 F.3d 704, 706 n. 1 (2<sup>nd</sup> Cir. 2003) (“[T]he legal standards for review of motions pursuant to [FRCP] 12(b)(6) and Rule 12(c) are indistinguishable....”).

6. Mr. Stewart’s Motion to Dismiss provides no original argument in support of his requested relief and instead, is merely a wholesale adoption of the *Plaintiffs’ Motion* (Docket No. 247) and the *Berry Group Motion and Brief* (Docket Nos. 588 and 589).

7. By Order dated May 31, 2006, Magistrate Judge Sam A. Joyner asked the parties to consider filing “adoptions” of previously filed briefs to reduce duplicate filings and help reduce some of the confusion that has been created in this case due to duplicate filings of the parties. *See* Docket No. 757, n. 1.

8. In compliance with Magistrate Joyner’s request, and because Mr. Stewart’s Motion to Dismiss is premised solely upon the arguments set forth in the *Plaintiffs’ Motion* (Docket No. 247) and the *Berry Group Motion and Brief* (Docket Nos. 588 and 589), Defendants hereby submit this response in opposition to Mr. Stewart’s Motion to Dismiss by incorporating, by reference, their respective *Responses* to the *Plaintiffs’ Motion* (Docket No. 495) and to the *Berry Group Motion and Brief* (Docket No. 775), the same as if fully set forth herein.

## II. CONCLUSION

For the reasons identified in Defendants' *Responses to Plaintiffs' Motion* (Docket No. 495) and to the *Berry Group Motion and Brief* (Docket No. 775), this Court should deny Mr. Stewart's Motion to Dismiss as premature, legally deficient, and unsupported by considerations of the relevant equities and efficiencies.

Respectfully submitted,

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I hereby certify that on this 1st day of July, 2006, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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